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## COVID-19 Financial Storm Lashing Settlement Deals

By **Andrew Strickler**

Law360 (April 2, 2020, 6:38 PM EDT) -- With the economic tsunami of the pandemic starting to take shape, lawyers' phones are ringing with requests from opposing parties to delay their clients' scheduled settlement payments or to reopen talks on already-signed deals.

Other all-but-final agreements and payment schedules are being thrown on the scrap heap as businesses and their owners have seen the revenue streams they expected to have to pay under the contracts suddenly disappear.

Amanda Fugazy, who heads the labor and employment practice at Ellenoff Grossman & Schole LLP in New York, said she's already seen a number of settlements, some of them sealed as recently as early March, come apart amid an unprecedented cash crunch for businesses.

"We're all busy doing this now," she said of her hospitality industry-heavy group. "I do anticipate this will take up a large chunk of our time over the next year, either renegotiating settlements already reached or going to litigation on settlements that fall apart over nonpayment."

Facing grim forecasts from the medical community and a staggered economy, Fugazy and others said both lawyers and litigants are finding a new level of flexibility when it comes to reopening settlements.

"My experience so far with this is that these are good-faith requests, and people giving notice that they just can't pay," said Cathy Fleming of Fleming Ruvoldt PLLC. "They're asking us to work with them."

Reopening a sealed settlement can be a hard pill for clients to swallow, particularly if the original negotiation was contentious or the deal reached wasn't what they felt they were due. But considering the current level of anxiety that an old employer or other legal adversary is about to go under, throwing the entire settlement into question, it's a pill some appear more willing to take. That's particularly true if the other side comes with a reasonably elongated payment schedule or an offer to pay interest on deferred balloon payments.

"It's always good practice, but now more than ever, it's a great time to be practical," Fleming said.

New York labor and employment lawyer Louis Pechman also said he's seen a handful of pending settlement talks in discrimination and FLSA cases upended since the COVID-19

crisis began. And requests from defense lawyers for reductions on balloon payments and other concessions have started coming in.

Well aware of the scope of the cash-flow problem and the possibility of bankruptcies, Pechman said some clients getting settlement checks have been open to longer payment schedules or other give-backs.

"Our goal at the end of the day is to get our clients paid, and if giving folks a temporary pause helps reach that goal, that's something we would consider and encourage the client to accept, particularly if there is proof of inability to pay," he said.

Pechman also said he's seen a "step back" in terms of the tenacity of litigation amid the crisis.

"We haven't seen a snippy email in weeks," he told Law360. "Difficult adversaries are now ending emails with exchanges like 'stay safe' or 'hope you're well.' So maybe the silver lining here is that attorneys are more in the mindset of finding a resolution than a fight."

Fielding post-settlement requests also raises ethical questions for lawyers, including in relation to client disclosures and whether or not the lawyer getting the request still represents the client post-settlement.

In other circumstances, said ethics expert Roy Simon, there can be some room to debate whether a particular post-settlement request is a "material" development in a client's case triggering a disclosure duty for the plaintiff's lawyer.

But with the obvious and massive economic fallout of the pandemic, any evidence that a payer may not be able to make settlement payments should be put in front of the client, he said.

"The virus is hanging over everything right now, and a lawyer cannot ignore the overall context," Simon said. "Even if a lawyer was under prior instruction from a client [to dismiss such requests], I don't think that can be taken as valid now, because it doesn't take into account the current facts and circumstances."

--Editing by Brian Baresch.

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